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By Facsimile

Ms. Carol Matthey, Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, N.W.
Washington, D.C. 20554

Re: Focal MFN Request

Dear Ms. Matthey:

This letter briefly outlines the reasons that the expanded most-favored-nation condition in the Bell Atlantic/GTE Merger Conditions does not allow Focal Communications Corporation ("Focal") to adopt in at least four other jurisdictions all of the provisions in an agreement currently in effect between Verizon and Global NAPs, Inc., in Vermont (the "Vermont agreement"). Focal asked the Commission to clarify its rights in a letter to you dated November 9, 2000.

Although Focal's letter addresses all provisions of the Vermont agreement, examination of the prior correspondence contained in the exhibits to Focal's letter makes clear that the principal purpose of its request is to transport into additional jurisdictions a provision of the Vermont agreement that addresses the issue of reciprocal compensation on Internet traffic. Under the terms of the Vermont agreement, the parties expressly disagreed as to whether Internet traffic constitutes local traffic subject to reciprocal compensation. Because they could not agree, the parties instead agreed to be bound by a decision of the FCC in the then-pending proceeding in which the Commission was considering whether Internet traffic is local traffic subject to reciprocal compensation. Until the time of an FCC order, and only until that time, Bell Atlantic agreed to pay compensation on an interim basis at the rates determined by a specified decision of the New York PSC (or any subsequent orders that changed it). The text of the relevant provision is attached.

Focal's request to transport the interim rate in the Vermont agreement to other states is not subject to the expanded most-favored-nation (MFN) condition that it relies on for several reasons.

First, by its express terms, the expanded MFN condition extends only to those interconnection arrangements, UNEs, or provisions of an interconnection agreement that are "subject to 47 U.S.C. § 251(c)." *See* Conditions ¶ 32. As the Commission has held, however, the payment of reciprocal compensation on Internet traffic is not subject to section 251 at all, let alone the specific provisions of section 251(c).

As an initial matter, the obligation of local exchange carriers to pay one another reciprocal compensation on local traffic is found in section 251(b) of the Act, not section 251(c). As a result, the expanded MFN condition on its face does not extend to the reciprocal compensation provisions of interconnection agreements. Nor do we believe that matters subject to section 251(b) can be read into the scope of the expanded MFN condition. On the contrary, section 251(c) on its face establishes "Additional Obligations of Incumbent Local Exchange Carriers" that are "[i]n addition to the duties contained in subsection (b)" (emphasis added). Indeed, the only provision of section 251(c) that refers to matters addressed by subsection (b) does so only to establish a "duty to negotiate in good faith . . . to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection." *See* Section 251(c)(1) (emphasis added). It in no sense converts the substantive duties of section 251(b) into obligations imposed by section 251(c), however. By the same token, the fact that the expanded MFN provision was expressly limited to matters that are subject to section 251(c) is fully consistent with the Commission's objective of promoting local competition. Indeed, the key market opening provisions that apply uniquely to incumbent local exchange carriers are all contained in section 251(c).

In any event, even if the expanded MFN condition were construed (we believe incorrectly) to encompass not only items subject to section 251(c), but also items subject to section 251(b), it still would not apply to provisions of agreements that address the payment of compensation on Internet traffic. As the Commission expressly has ruled, the "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a *local* area." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1034 (1996) (emphasis added) ("Local Competition Order"); *see also* 47 C.F.R. § 51.703(a) ("Each [local exchange carrier] shall establish reciprocal compensation arrangements for transport and termination of *local* telecommunications traffic" (emphasis added)). In contrast, "the reciprocal compensation provisions of section 251(b)(5) . . . do not apply to the transport or termination of interstate or intrastate interexchange traffic." Local Competition Order at ¶ 1034. Moreover, the Commission expressly has held that "ISP-bound traffic is *non-local* interstate traffic" and "*the reciprocal compensation requirements of section 251(b)(5) of the Act and [the FCC's implementing] rules do not govern inter-carrier compensation for this traffic.*" *Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 26 n.87 (1999) (emphasis added) ("Reciprocal Compensation order").¹ As such, the provisions of the Vermont agreement that address the issue of reciprocal compensation on Internet traffic are not subject to the expanded MFN condition under any conceivable construction of that condition.

¹ That order was subsequently vacated and remanded for further explanation, and the Commission currently is conducting a proceeding on remand. The Commission's prior order remains its only previous decision addressing whether section 251(b)(5) applies to Internet traffic, however, and there is no reason for the Commission to reach a different conclusion on remand.

Second, by its terms, the provision of the agreement that Focal wants to transport to other states has expired, and the Merger Conditions do not permit a carrier to adopt terms from an agreement "beyond the last date that they are available in the underlying agreement." *See* Conditions § 32.

The Vermont agreement specified that Bell Atlantic would pay compensation on an interim basis only until the FCC issued a decision in its then-pending proceeding on whether Internet traffic is local traffic. Significantly, it did not say that the interim rates would remain in effect until a final non-appealable decision, but rather only until an initial FCC decision. As described above, the FCC released its decision in that proceeding in 1999, and expressly held that Internet traffic is not local and is not subject to reciprocal compensation under section 251. Reciprocal Compensation order at § 26 n.87. At that point, the provision in the Vermont agreement establishing an interim compensation arrangement expired, and there no longer is an effective reciprocal compensation term for Focal to opt into.

Had the parties to the Vermont agreement mutually intended for Bell Atlantic to continue paying reciprocal compensation on Internet traffic until there was a final, non-appealable decision on the Internet traffic question, they could easily have drafted words to that effect. No such requirement is to be found in the Vermont agreement, however, which by its own terms is an *interim* arrangement. And at least one of the states where Focal seeks to adopt that agreement has found that the Commission's finding that Internet traffic is not local continues to control.²

Third, the expanded MFN condition also does not apply to provisions in agreements that are not "consistent with the laws and regulatory requirements of [] the state for which the request is made," and does not apply to state-specific pricing provisions such as the provision in question. *See* Conditions § 32. Here, however, the provision of the Vermont agreement establishing an interim compensation rate for Internet traffic is not consistent with -- and in two cases would directly contravene -- the orders of the state regulatory commissions in three of the states for which Focal made its request.

In fact, the Massachusetts DTE has twice rejected carriers' efforts to charge reciprocal compensation on Internet traffic based on the DTE's conclusion that Internet traffic is not local traffic, is not subject to reciprocal compensation under the Act, and would deter the development of local competition.³ Likewise, the Virginia SCC has held that, because Internet traffic is interstate rather than local, it lacks authority to establish compensation arrangements for this traffic and has deferred to the jurisdiction of the FCC.⁴ The District of Columbia PSC has made "bill and

² *MCI WorldCom Technologies, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts*, DTE 97-116-D (Mass. D.T.E., rel. Feb. 25, 2000).

³ *See* Order Denying Global NAPs, Inc.'s Motion to Vacate the Department of Telecommunications and Energy's Orders, D.T.E. 97-116-C and D.T.E. 97-116-D/99-39, and to Reinstate D.T.E. 97-116, D.T.E. 97-116-E (rel. July 11, 2000).

⁴ *See* Final Order, Petition of Starpower Communications, LLC for Declaratory Judgment and Petition of Cox Virginia Telcom, Inc. v. GTE South Inc. for Enforcement of Interconnection Agreement, Case Nos. PUC990023 and PUC990046 (rel. January 24, 2000).

keep" arrangements mandatory, unless the parties negotiate a different arrangement, which they have not here.⁵ Focal's attempt to import into these states a provision from another that is inconsistent with the express orders of the state commissions should be rejected as inconsistent with both public policy and with the merger condition language quoted above.

Indeed, the fact that Focal is trying to import a provision that is inconsistent with these state orders presumably explains why it has not submitted its supposed dispute over the availability of the Vermont agreement to the relevant state commission for resolution as the expanded MFN condition expressly requires. *See* Conditions ¶ 32. At an absolute minimum, the Commission should require Focal to take its request to the state commissions in the states where it wants to adopt the Vermont agreement to allow those states to determine the consistency of the reciprocal compensation with the policies in those states. Likewise, those state commissions should be the ones to interpret whether the reciprocal compensation provisions have expired in light of this Commission's February 1999 order.

For these reasons, under the Merger Conditions, Focal does not have the right to adopt the reciprocal compensation provision from the Global NAPs Vermont agreement in the other jurisdictions.

Sincerely,

Attachment

A handwritten signature in black ink, appearing to be "B. J. K.", is written over the word "Attachment".

⁵ Order No. 10964 (dated March 31, 1997) and Order No. 10979 (dated May 9, 1997), *In the Matter of the Application of Bell Atlantic-Washington, D.C., Inc. and Teleport Communications, Washington, D.C., Inc. for Approval of an Arbitrated Agreement Under Section 252(e) of the Telecommunications Act of 1996*, Formal Case No. 964B.

The Vermont Agreement

The Vermont agreement, dated November 1, 1998, includes the following provision on reciprocal compensation:

5.7.2.3 The Parties stipulate that they disagree as to whether traffic that originates on one Party's network and is transmitted to an Internet Service Provider ("ISP") connected to the other Party's network ("ISP Traffic") constitutes Local Traffic as defined herein, and the charges to be assessed in connection with such traffic. The issue of whether such traffic constitutes Local Traffic on which reciprocal compensation must *[sic]* be paid pursuant to the 1996 Act is presently before the FCC in CCB/CPD 97-30 and may be before a court of competent jurisdiction. *The Parties agree that the decision of the FCC in that proceeding, or as [sic] such court, shall determine whether such traffic is Local Traffic (as defined herein) and the charges to be assessed in connection with ISP Traffic.* If the FCC or such court determines that ISP Traffic is Local Traffic, as defined herein, or otherwise determines that ISP Traffic is subject to reciprocal compensation, it shall be compensated as Local Traffic under this Agreement unless another compensation scheme is required under such FCC or court determination. Until resolution of this issue, BA agrees to pay GNAPS Reciprocal Compensation for ISP traffic (without conceding that ISP Traffic constitutes Local Traffic or precluding BA's ability to seek appropriate court review of this issue) pursuant to the [New York Public Service] Commission's Order in Case 97-C-1275, dated March 19, 1998, as such Order may be modified, changed or reversed.

(emphasis added)